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No. 05-1157

Supreme Court, U.S.
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In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

The United States has filed a brief signed by both the SEC and the Antitrust Division urging this Court to grant certiorari and reverse the Second Circuit's ruling denying antitrust immunity. The United States explained in its brief that the court of appeals' erroneous decision "failed to give adequate effect to the securities laws" and as a result threatens to "undercut critical national regulatory policies and interfere with the capital formation process." U.S. Br. 8, 19. The United States demonstrated that, "[a]s a practical matter," the erroneous immunity standards adopted by the Second Circuit will govern IPOs throughout the country because venue "will generally lie within the Second Circuit." *Id.* at 9. And it emphasized the "paramount importance" of avoiding disruption of the "Nation's vitally important financial markets" caused by an immunity standard that will "chill legitimate activity." Accordingly, the Solicitor General has concluded that "certiorari should be granted" to resolve immunity issues as to which "clarity" is "critical." *Ibid.* The same conclusion was previously expressed in *amicus* filings by the National Association of Securities Dealers and the New York Stock Exchange, self-regulatory organizations that, along with and closely overseen by the SEC, have regulatory authority over IPOs. See also Pet. Supp. Br. (June 12, 2006) (quoting SEC Commissioner Paul Atkins).

Plaintiffs' response to the United States confirms that this Court's review is necessary to overturn a denial of implied immunity that is inconsistent with this Court's decisions in *Gordon* v. *New York Stock Exch.*, 422 U.S. 659 (1975), *United States* v. *National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975), and *Verizon Comms.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004). Plaintiffs cite not one of those controlling precedents in their supplemental submission and do not attempt to address the United States' showing that the court of appeals' ruling is a direct threat to the operation of public securities markets regulated by the SEC.

Plaintiffs quote at length from the submissions of the Antitrust Division below arguing against immunity, without acknowledging that the SEC was equally vigorous in urging that immunity here is essential to the functioning of the securities regulatory regime in which it supervises all of the alleged conduct. The Solicitor General's brief to this Court "reflects the considered view of the United States." U.S. Br. 4 n.2. The SEC and Antitrust Division now speak with one voice in urging that certiorari should be granted to reverse an erroneous decision on an "important and recurring" issue that has produced "confusion in the lower courts"—an error that threatens to gut "the statutory scheme for regulating public offerings of securities." *Id.* at 7, 9. While plaintiffs quarrel with the Solicitor General on the merits issues, they have no answer to his showing that this case imperatively calls for further review.

1. The immunity analysis presented by the United States requires dismissal of these claims. Plaintiffs object that the immunity standard set forth in the brief of the United States—that securities market participants are immune from antitrust suits that "ultimately rest on collaborative activities that are either permitted under the securities laws or inextricably intertwined with such permitted activities" (U.S. Br. 8)—is a "new argument" that differs from petitioners' immunity arguments and has not previously been presented. But the United States has properly focused on an important aspect of the repugnance analysis, which petitioners presented in the petition for certiorari.

Petitioners have explained that immunity from plaintiffs' suits flows directly from the standards set forth by this Court in *Gordon* and *NASD*. Scrutiny by an antitrust jury in a treble damages action is plainly repugnant to the securities regulatory scheme because the SEC and SROs have by regulation and enforcement action exercised "direct regulatory power" over exactly the same tie-in and commission practices plaintiffs allege, and because exercise of regulatory authority is

"sufficiently pervasive" to oust the antitrust laws. See Pet. 20-24; Pet. Reply to Billing 2-4; *Gordon*, 422 U.S. at 682, 685; *NASD*, 422 U.S. at 730-734. But petitioners also agree with the United States that immunity may be conferred here under the rationale that all the conduct alleged is either permitted by SEC regulation or is "directly related to" or "inextricably linked" with permitted conduct (U.S. Br. 9, 11)—formulations that rephrase the criteria set out in *Gordon* and *NASD* but similarly seek to identify whether antitrust scrutiny may "conflict" with the administrative scheme.

The complaints, plaintiffs concede (at 3, 9), refer to a host of joint activities that are permissible and encouraged by the SEC, such as the operation of underwriting syndicates, conduct of road shows, and building the IPO book. The tie-in and commission practices that plaintiffs allege are inextricably intertwined with those permitted activities. For example, the United States has pointed out that the SEC has "specifically approved" book-building inquiries into a customer's long-term interest in an IPO stock and the price at which it might accumulate a position in the aftermarket "as important in determining the size and price of the offering" and "the allocation of shares." U.S. Br. 15. Distinguishing "legitimate book-building" from attempts "to induce a bid or purchase," SEC guidance indicates, "depends on the particular facts and circumstances" of each communication. Pet. App. 225a.

Whether particular conversations crossed the lines drawn by the SEC under securities laws standards is inextricably linked with book-building conduct approved by the agency. A lay jury's consideration of that question under competition-first antitrust principles would inevitably lead to conflict with the SEC's expert judgment and undermine the congressional goal of consistent administrative supervision. See Pet. App. 129a n.2, 156a, 196a-197a; *Brown* v. *Pro Football*, 518 U.S. 231, 240-242 (1996); AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 243a, at 77 (Supp. 2006) ("permitting the antitrust challenge [in these cases] permits a jury to decide an

issue that gave the SEC's own experts considerable difficulty"). The risk of jury condemnation and treble damages awards to huge classes of investors based on the interpretation of a word or phrase uttered during book-building conversations would, the United States recognizes, "chill legitimate activity" approved by the SEC and "effectively vitiate the immunity for the authorized conduct and thus conflict with the regulatory scheme." U.S. Br. 9, 11. The fact that plaintiffs are attacking permissible book-building practices and regulated practices directly linked to them lies at the heart of petitioners' case for immunity. See Pet. 9, 27-30; Pet. Reply to Billing 6-9; see also Pet. App. 193a-194a.

The conduct plaintiffs allege with regard to commissions is likewise "inextricably intertwined" with conduct permitted by the SEC. Whether a commission payment is proper under the securities laws is a complex question. See Pet. 8. The difficulty of parsing the facts concerning commission payments and the need to apply securities standards in conducting that inquiry is illustrated by *Invemed Assocs.*, where an NASD panel determined that higher-than-normal commissions paid by customers seeking IPO allocations did not violate NASD rules. See Pet. Reply to Pfeiffer 3-4. After a detailed review of testimony concerning particular customer relationships and commission payments, as well as expert evidence, the hearing panel held that none of the 700 payments in question was unlawful. There is no reason to expect that a lay jury applying general antitrust criteria would reach the same result. As with plaintiffs' tie-in allegations, fear of "mistaken inferences" and "false condemnations" leading to open-ended class action liability would cause market participants to refrain from engaging in permissible activities (*Trinko*, 540 U.S. at 414), making immunity essential to protect the regulatory scheme. See *Gordon*, 422 U.S. at 685, 690 (finding immunity where SEC had "direct regulatory power" over "rules and practices" regarding commissions); Pet. 26-28.

These conflicts with the regulatory scheme are of great practical concern because plaintiffs' antitrust suits are subject to none of the limits that Congress and this Court have imposed on private securities actions to curb "abuses of the class action vehicle in litigation involving nationally traded securities," including the "targeting of deep-pocket defendants" and extraction of "extortionate settlements." *Merrill Lynch* v. *Dabit*, 126 S. Ct. 1503, 1510-1511 (2006). Those safeguards, evaded here, include limiting recovery for "manipulative and deceptive practices" in public securities markets to *single* damages, as well as rigorous pleading, class action, and discovery rules. 15 U.S.C. § 78bb; Pet. 29-30; see AREEDA & HOVENKAMP, *supra*, ¶ 243, at 76-77 (Supp. 2006) (observing that many claims of securities fraud or manipulation "can be pled as an antitrust violation").

2. The arguments presented by the United States are fairly included in the question presented in the petition. Plaintiffs are incorrect in asserting (at 4-6) that the United States' arguments are barred by Supreme Court Rule 14.1(a). Under that rule a question presented "is deemed to comprise every subsidiary question fairly included therein." The "inextricably intertwined" standard for implied immunity is easily subsumed in petitioners' question presented concerning the circumstances under which courts should imply immunity from an antitrust suit challenging heavily regulated conduct during securities offerings. See Pet. I; STERN, GRESSMAN, *ET AL.*, SUPREME COURT PRACTICE § 6.25(f), at 413 (8th ed. 2002) ("it is unnecessary to convert into a separate question every subsidiary issue that is implicit or necessarily involved in the question presented"). The position of the United States, moreover, is simply a synthesis of arguments made by the Antitrust Division and the SEC and considered by the courts below, and a variation on the immunity arguments made by petitioners throughout this litigation. U.S. Br. 4 n.2; *supra*, pp. 2-4. "Once a federal claim is properly presented," the United States as *amicus curiae* is free to make "any argument

in support of that claim." *Harris Trust & Savings Bank* v. *Salomon Smith Barney*, 530 U.S. 238, 245 n.2 (2000).

The decisions relied on by plaintiffs have no relevance here. In *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992), the regulatory takings claim this Court declined to consider was legally distinct from the physical takings claim presented in the petition and "neither of the two questions [was] subsidiary to the other." In *Izumi Seimitsu* v. *U.S. Philips*, 510 U.S. 27, 32 (1994), the question whether courts of appeals should routinely vacate judgments when cases are settled on appeal did not fairly include the "analytically and factually" distinct issue whether the petitioner was improperly denied leave to intervene. Here, by contrast, the arguments advanced by the United States address the very same issue raised by the question presented—the circumstances under which courts should imply immunity from antitrust law challenges to highly regulated conduct during securities offerings—and so are fairly included in that question. See *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 214 n.8 (2005).

Beyond this, none of plaintiffs' arguments in the supplemental brief undermines our showing—supported by the United States—of the certworthiness of these cases. The United States agrees with petitioners that the Second Circuit's decision will undercut the "critical national regulatory policies" that *Gordon* and *NASD* sought to protect, that it is of "paramount importance" that the court of appeals' ruling threatening market participants with treble damages not be allowed to undermine "the capital formation process in this country," and that there is "continuing confusion in the lower courts" regarding the "recurring" issue of when antitrust immunity should be implied. U.S. Br. 9, 11, 19. This case clearly merits review regardless of the application of Rule 14.1(a) to any particular argument made by the United States.

3. Immunity issues are properly resolved on a motion to dismiss. Plaintiffs assert (at 6-8) that the United States

would hold them to a "heightened pleading standard" that requires them to negate an affirmative defense, at odds with the principle that immunity is disfavored and should be implied narrowly. But the Solicitor General nowhere in his brief suggests that more has to be pled than Rule 8 requires. See also Br. of the United States as *Amicus Curiae* in *Bell Atlantic* v. *Twombly*, No. 05-1126. He simply contends that plaintiffs' conclusory allegations, which on their face rest on conduct either permitted by the SEC or intertwined with permitted conduct, cannot be the basis for massive antitrust suits that endanger the securities regulatory system and capital formation process. U.S. Br. 13-15.

Plaintiffs have pled themselves out of court, like the plaintiffs in *NASD*, whose claims were dismissed with prejudice on implied immunity grounds. 422 U.S. at 697, aff'g 374 F. Supp. 95, 114 (D.D.C. 1973). Even if the threshold issue of immunity is viewed as a defense, the decisions upon which plaintiffs rely acknowledge that a defense "may be resolved definitively on the face of the complaint" when the plaintiff pleads the basis for the defense. *Barry Aviation* v. *Land O'Lakes Mun. Airport*, 377 F.3d 682, 688 (7th Cir. 2004); see also *Xechem, Inc.* v. *Bristol-Myers Squibb*, 372 F.3d 899, 901 (7th Cir. 2004). And plaintiffs concede (at 7 n.11) that the district court here "properly held that implied immunity was 'an affirmative defense that appears on the face of the complaint, and as such is properly addressed at the motion to dismiss stage.'"

Every motion to dismiss on immunity grounds—even the very different qualified immunity ground at issue in most of plaintiffs' authorities—requires the district judge to look at the facts pled in the complaint to see if immunity applies. *E.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985) ("resolution of these [qualified immunity] issues will entail consideration of the factual allegations that make up the plaintiff's claims for relief"); *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998) ("the district court should resolve that threshold ques-

tion [of qualified immunity] before permitting discovery" by deciding "whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law"). Whether "allowance of an antitrust suit would conflict with the operation of the regulatory scheme" is a "legal question" well suited to determination on the pleadings. *Gordon*, 422 U.S. at 688; see *NASD*, 422 U.S. at 700-702. Plaintiffs allege conduct that is all closely regulated by the SEC and SROs and that is either permitted by regulators or inextricably intertwined with permitted activity. It is therefore a straightforward matter to determine that immunity is required to allow the securities regulatory scheme to function as Congress intended, whether that question is analyzed under the principles set forth in *Gordon* and *NASD* or the Solicitor General's interpretation of them. See *supra*, pp. 2-5; *Van Buskirk* v. *New York Times*, 325 F.3d 87, 91-92 (2d Cir. 2003) (dismissal with prejudice proper when complaint is "not reasonably susceptible" to an interpretation that cures the legal deficiency and provides no "'indication that a valid claim might be stated'").

4. Plaintiffs' conspiracy arguments do not overcome immunity. Citing decisions of this Court which are not relevant because the conduct at issue was not subject to regulatory oversight, plaintiffs assert that a "prohibited conspiracy" or other "prohibited activity" carried out in the course of lawful conduct cannot be impliedly immune. Pl. Supp. Br. 8-10 & n.14. This Court's precedents contradict that argument. For example, by the time *Gordon* reached this Court the SEC had outlawed fixed commission rates as horizontal price fixing, yet this Court implied immunity. 422 U.S. at 682. In *NASD* plaintiffs alleged horizontal and vertical conspiracies to fix prices and quash development of a secondary market in mutual fund shares, yet immunity was implied. 422 U.S. at 701-704. In *Trinko* this Court observed that had it not been for an antitrust savings clause the regulatory scheme created by the Telecommunications Act would have been a "good

candidate for implication of antitrust immunity," even though plaintiffs alleged a clear violation of a statutory duty and Verizon had entered into a consent decree and paid millions of dollars to the United States and competitors. 540 U.S. at 401, 403-406. In *Pan Am. Airways* v. *United States*, 371 U.S. 296 (1963), the Civil Aeronautics Board condemned a joint ownership arrangement as "disruptive of the regime visualized by" Congress in the Federal Aviation Act and "out of harmony with the [FAA's] statutory standards for competition," yet this Court held that an antitrust challenge to the arrangement "should have been dismissed" because whether "transactions of that character meet the standards of competition and monopoly provided by the [FAA] is peculiarly a question for the Board." *Id.* at 309-313 & n.19; see *id.* at 310 ("If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide"). See also *Hughes Tool Co.* v. *TWA*, 409 U.S. 363, 405 n.18 (1973) (implying immunity although, according to the dissenting Justices, the challenged practices were undertaken "without [regulatory] approval or knowledge"); *Brown*, 518 U.S. at 235 (1996) (implying immunity though defendants "unilaterally implemented" a change in terms of employment that appeared to violate federal labor laws).

It is thus demonstrably false to claim, as plaintiffs do (at 9), that "forming and implementing [a] prohibited conspiracy" cannot be immune from antitrust scrutiny, even if the conduct is regulated by an expert agency that takes competition into account. And it is beside the point here, where the question *whether* particular conduct was prohibited depends on nuanced distinctions drawn under securities law standards. The fact that antitrust juries applying competition-first principles will not replicate securities regulators' judgments creates the potential for conflict that makes implied immunity necessary to protect the regulatory scheme.

5. The amicus brief filed by the United States confirms the need for this Court's review. Contrary to plaintiffs'

contention (at 10) that "the United States' apparent position that a conspiracy to require tie-ins or laddering does not violate the antitrust laws" provides "no reason" for this Court's review, that position is a compelling reason to grant certiorari. The Solicitor General has shown that the Second Circuit erred as a matter of law regarding an issue of enormous importance to the capital formation process. Plaintiffs have not begun to suggest how their allegations could be viewed as anything other than a direct attack on conduct that is permitted by the SEC and closely intertwined with permitted activity. And they have said not a word to refute our showing that under *Gordon*, *NASD*, and *Trinko*, the danger of conflict with the securities regulatory scheme is inescapable and severe when treble damages attacks are made on permissible syndication practices and directly related underwriting activities that are closely supervised by the expert agency.

Although plaintiffs assert (at 10) that the question presented is not a recurring one, they do not deny our showing—reinforced by the United States—that these "epic" class actions could be refiled whenever the stock market declines. The same claim could always be made: that underwriters acting together in syndicates "agreed" and made inquiries of customers about their aftermarket interest in the IPO stock. Then nationwide class action antitrust proceedings focused on hundreds of IPOs could be utilized to extract immense settlements, given the inevitable risk of false condemnations by antitrust juries. The United States is right in saying that this would cripple our financial markets.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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I, Timothy S. Bishop, counsel for petitioners and a member of the Bar of this Court, certify that on November 27, 2006, I served three copies of the Supplemental Brief for Petitioners in the above-captioned case via UPS overnight, addressed to:

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